# Korean Competition Statute: Its Limits and Measures for Improvements

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## Abstract

*Over recent years, there have been numerous debates among various members from the Korean legal community in discussing whether the Monopoly Regulation and Fair Trade Act("MRFTA") currently effective in Korea, as it pertains to regulating the unfair trade practices of business enterprises (the "Competition Statute"), contains sufficient mechanisms to provide adequate remedies to injured parties in Competition Statute violation cases. Despite all efforts exerted by the Fair Trade Commission("FTC") in enforcing the Competition Statute, there seems to be an obvious limit as to what it can do, which appears to be caused by the following three main factors: (i) a general perception that governmental regulatory efforts should be contained; (ii) a general perception that corrective orders are overly intrusive; and (iii) cultural indifference in resorting to legal remedies. There are measures that may be taken to overcome such barriers which limit both the regulatory body and injured parties, which include such measures as introducing treble damage compensation, lowering the barrier of commencing a legal action, allowing injunctive orders, and introducing a Parens Patriae action or Consent Decree system.*

*Over recent years, there have been numerous debates among various individuals from the Korean legal community in relation to the Monopoly Regulation and Fair Trade Act ("MRFTA"). Among the various issues that come up in such debates, one pertains to the effectiveness of a part of the MRFTA which is related to regulating the unfair trade practices of business enterprises (the "Competition Statute" or "Statute"). In particular, discussions arise in terms of whether the current Statute contains sufficient mechanisms to provide adequate remedies to injured parties in Competition Statute violation cases. In that regard, this article will review some of the issues that arise in such discussions. In doing so, this article has been divided into three main sections. The first section will illustrate the types of remedies the Statute currently affords to injured parties. Thereafter, the second section will provide a brief discussion on certain factors that limit the FTC's efforts in providing appropriate remedies to injured parties. The last section will provide a discussion on potential measures that may be taken to improve the remedial measures in future cases.*


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## I. Remedies under the Statute

In general, there are three types of remedies an injured party may seek under the Statute. Specifically, they include administrative remedy, criminal sanction and civil remedy. What distinguishes an administrative remedy from the other two is that, as their names may suggest, administrative remedies are rendered by a regulatory agency while the other two are rendered by the court.

First, looking at administrative remedies, administrative remedies in general may be classified into two main categories. One relates to issuing any one of several corrective orders (as discussed in further detail below) and the other relates to imposing monetary fines. The Fair Trade Commission ("FTC"), which is the main governmental body that enforces the Statute, may resort to any one of such administrative remedies in order to regulate business activities or transactions that unduly restrain competition and to promote fair competition in the market.

### *A. Administrative Remedies*

The first major category of administrative remedy is in issuing certain corrective order(s) against a violator of the Statute. Depending on the type as well as the magnitude of violation involved, the FTC may impose any one or a combination of the following corrective orders pursuant to the Statute.

One type of corrective order is a cease and desist order. This is a remedy where the FTC issues an official order against a violator to cease committing an offending act. For example, in case where a market-dominant entity engages in tie-in sales activities, the FTC may order such entity to cease such tie-in sales activities. Further, in case certain entities engage in an improper concerted act (i.e., a cartel), the FTC may order such entities to cease engaging in such act.

A second type of corrective order is an order to issue a public announcement of wrongdoing. This is a remedy where the FTC issues an order against a violator to make a public announcement that it has been sanctioned by the relevant authorities in connection with a violation of the Statute. The public announcement is required to be made through newspapers or other type of mass media. For example, with respect to companies that collude in illegal price-fixing activities, the FTC may order such violators to publish a notice which, in its pertinent part, may read that "Because our

company violated Article 19 of the Fair Trade Law, our company received the following cease and desist order from the FTC: [*details of cease and desist order*]." In doing so, the FTC may also specify such matters as the type of publication, the size of the notice, the number of times the notice is to be published, etc.

A third type of corrective order is an order to undo the offending act. This is a remedy where the FTC orders a violating party to undo or annul, as the case may be, the act it engaged that resulted in restraining competition in violation of the Statute. For example, when a market-dominant entity, through the abuse of its dominant status, unfairly sets its price at a certain high level and such act results in retraining competition, the FTC may order such party to reduce the price. Also, in order to regulate companies from engaging in improper collaboration or business combination activities which result in restraining competition in the market, some other types of activities that the FTC may order to undo or annul, as the case may require, include certain share transfers, appointment of interlocking directors, officers or employees, mergers, business transfers, and establishment of joint ventures.

In lieu of issuing corrective orders discussed above, the FTC sometimes resorts in merely providing a warning notice or a recommendation to rectify the violation. In general, warning notices are given in such instances where the violation involved is not too serious or when the violating party voluntarily takes relevant measures to undo the violating act. Further, as another alternative, the FTC may also simply provide a recommendation to rectify the offending act. In such instances where the FTC issues a recommendation to rectify the offending act and the recommendation is abided by by the violator, the violator is deemed to have been issued with an official corrective order by the FTC (pursuant to Article 51 of the MRFTA).

A second category of administrative remedy to which the FTC may resort is the imposition of monetary fines against violators of the Statute. In general, a monetary fine may be imposed against the violator as an additional penalty even if such violator has already been issued with any of the corrective orders noted above. The way the FTC determines the amount of fine to be charged against a particular violator is based on the amount of gross sales the violator derived directly from its violation during the period such violation persisted. However, this is not to say that the fine amount has no limit. For each type of unfair practice specified in the Statute, the Statute stipulates an upper limit of penalty rate to be applied as well as criteria to





be reviewed in determining the exact penalty rate to be applied against the subject violator. For example, in the event the FTC concludes that a certain company has been or is engaging in improper concerted acts (i.e., cartel) in violation of the Statute, the FTC may subject such company with up to a 5% surcharge on the gross sales it derived in relation to such cartel activity. The actual rate to be applied by the FTC for cartel violation is classified into 3 levels, and their application depends on various factors, such as the extent of subject party's involvement in the act, severity of the violation, period of violation, etc.

In case a violation relates to a certain business combination transaction (which may include, among others, a merger or incorporation of a joint venture), the FTC, in addition to issuing corrective orders or imposing monetary fines, may also raise a formal suit to nullify and cancel the merger or the joint venture incorporation itself. Further, in the event a party which has been issued with any of the corrective orders (e.g., a cease and desist order, order to issue a public notice of wrongdoing, etc.) does not comply with such order, the FTC may charge a delinquent penalty on a daily basis until such party has fully complied with the specific order.

In practice, among all of the administrative remedies discussed above, the FTC most often relies on the use of a cease and desist order. The next most commonly referred remedies that FTC utilizes are the public announcement order and monetary fine, in which FTC's ultimate choice between such two measures depends on circumstantial factors that exist in each given case. For example, in cases where there are a large number of injured parties, or in cases where there is a high probability that the parties that already incurred damages are likely to be harmed again due to their comparatively powerless status, the FTC more often issues orders for public announcements. On the other hand, in cases where the violating parties acquired certain benefits from their violations (such as through cartel activities), or in cases where the violations involved are severe in nature, the FTC more often relies on imposing monetary fines. Especially, in instances where the FTC deems that illegal cartel activities are involved, the FTC's current trend is to assess a substantial amount of monetary fines against each of the offenders involved in the cartel.

### *B. Criminal Sanction*

Another remedial measure the Statute affords is a criminal sanction. Specifically, the Statute affords the FTC with the authority to commence a criminal proceeding. Criminal sanctions are the most severe penalties available under the Competition Statute and therefore, can only be imposed against the alleged violators when convicted by a court.

The Statute stipulates an official filing of a complaint to the Prosecutors' Office by the FTC as one of the requirements for the prosecutor to issue an indictment against an alleged violator. That means that criminal proceedings for any given offense, in general, can be commenced only if the FTC files a formal complaint to the prosecutor in relation to such offense. In other words, the FTC, on its own, is unable to impose any criminal sanction against any alleged violator, but it has the authority to assess and determine whether or not to commence a criminal proceeding in connection with any given case in response to a complaint filed by an injured party. As an exception to the above general rule, however, the Statute provides that in instances where the Prosecutors' Office deems that (i) there is a clear violation of the Statute under an objective standard and (ii) the violation clearly restrains competition in the market, the Head of the Prosecutors' Office may request the FTC to file a complaint in connection with a relevant violator.

In practice, when the Head of the Prosecutors' Office makes such a request, it is known that the FTC, more often than not, files the relevant complaint in response thereto. It, however, is also known that there have not been many cases in which the FTC actually filed complaints requesting for criminal sanctions to be imposed against offenders. For that matter, even in such instances where such complaints ultimately led to legal proceedings, the courts, thus far, have in general limited their rulings to imposing monetary fines rather than imposing actual criminal sanctions.

### *C. Civil Remedy*

Another remedial measure an injured party may pursue is to bring a civil law suit against the violator to recover monetary compensation for the damages it incurred. Since the FTC does not have any authority to order any injured party to raise or not raise such civil claim against offenders, the issue as to whether or not to bring such





claim is totally dependent upon the injured party. Therefore, unless the offenders themselves take measures to compensate the injured parties, the injured parties, on their own, must bring civil claims for damages against the offenders if they wish to be compensated for their losses. For that matter, a class-action suit, in general, is not available in Korea. Even new class action legislation, which will allow class-action suits to be filed from year 2005, is limited to claims concerning securities transactions. Thus, regardless as to the number of injured parties that exists in any single Competition Statute violation case, each injured party in any particular case must bring a separate action against the offender(s) involved in the case.

In general, injured parties in Competition Statute violation cases may raise civil claims for damages under general tort theory, pursuant to Article 750 of the Korean Civil Code. Since the claims under Article 750 are based on general tort theory, the claimant bears the burden of proof in showing the existence of four requisite elements. Namely, the claimant must show that (i) there has been an illegal act, (ii) such act has been committed intentionally or negligently, (iii) such act caused damage, and (iv) actual damage has been sustained by the claimant. One exceptional situation in which the foregoing requirement does not apply is when the FTC conclusively renders a corrective order against an offender. In other words, in the event the FTC rules that a certain party has violated the Statute and issues any one of the corrective orders discussed previously, the injured party in such case is deemed to have satisfied the second element noted above (pursuant to Article 56 of the MRFTA). Further, the existence of a finally concluded FTC finding will satisfy in practice the showing of the first element noted above.

What that means is that the injured parties in Competition Statute violation cases, in essence, may take one of the following two approaches to recover compensation for damages incurred. One approach is for an injured party to bring a civil claim for damages against the alleged offender pursuant to Article 750 of the Korean Civil Code, even before the corrective order is finalized with no possibility of further appeal. In this case, the claimant will have the burden of proof in showing all of the four requisite elements mentioned above. On the other hand, an alternative approach is for the injured party to bring a civil claim for damages after the FTC's corrective order against the offender is finalized with no further possibility of appeal. In this case, the claimant, pursuant to Article 56 of the MRFTA, will be deemed to have satisfied the second element referred above and accordingly, the court will promptly

begin reviewing the merits of the case once the claimant satisfies the existence of other elements.

However, in Korea, civil remedy is not a commonly relied on means to recover damages by injured parties. Such seems to be the case because, despite the fact that the number of injured parties arising in any particular competition law violation case is quite large, the amount of damages involved therein in monetary value is not significant. In other words, on an individual basis, the amount of damages that any single injured party suffers is often too small that such party either foregoes the option or resort to other means. Accordingly, in Korea, situations where injured parties actually resort to a civil remedy are often limited to such instances where there are a small number of injured parties and the amount of damages at stake for each injured party is large. An exemplary situation in which such circumstances may arise is when some of the participants in a bidding process engage in an improper collusion or concerted act to fix their bidding prices.

Further, one of the issues that often arise in relation to a civil remedy is the issue as to whether the court has legal authority to render an injunctive order against the alleged violator (i.e., to forbid from engaging in certain act(s)). On this matter, the majority of scholars and legal commentators seem to hold a negative perception. It is generally perceived that the remedy generally afforded to injured parties through civil claims under the Statute is limited to obtaining monetary compensation for their damages incurred, if any, and that it does not include any remedy to have the offender take certain actions or forbear from taking an action. Therefore, an injunctive order generally is not deemed as one of resolutions that an injured party may seek through a civil claim in a competition law violation case.

## II. Limitations of Korean Competition Statute

Despite all the efforts the FTC exerts in enforcing the Statute to regulate unfair trade practices that arise in the market and to provide remedies to relevant injured parties in the event violations arise, there are limits as to what the FTC can do in achieving such objectives. Although there are a number of factors that actually affect the FTC's enforcement efforts, this section will cover three factors which seem to pose the most significant impacts.





One of the factors that limits the FTC's efforts seems to arise from a predominant perception that exists within the Korean legal community with regard to the FTC's regulatory authority. There seems to be a prevailing perception that any governmental agency's regulatory measures should be limited to those that are expressly stipulated under the relevant law which confers the agency with the relevant authority and that not even a court decision should enable the subject agency to implement any new regulatory measures, regardless as to how effective or appropriate such new measure may be in any given case. Accordingly, there is a general perception that it is not possible for the FTC to request the court to render any court order which is outside the scope of the measures prescribed under the Statute, even if the parties concerned in the case have agreed to comply with such order. In other words, the FTC, due to the aforementioned perception, is more or less stripped of its ability to exercise any discretion to enforce any regulatory measure which may possibly be more practicable in a given situation.

Another factor that limits the FTC's efforts is the general perception that legal commentators have with regard to corrective orders; that is, they are overly intrusive. Based on the fact that corrective orders issued by the FTC, in essence, either limit one's action or impose a certain obligation against one's own free will, legal commentators view that any and all corrective orders that the FTC issue must have a firm legal basis. Due to such scrutiny imposed by the commentators, the FTC has a tendency not to issue any corrective order other than those expressly prescribed in the Statute, despite the fact that the Statute clearly affords it with authority to exercise its discretionary judgment to enforce a corrective order other than the ones the Statute prescribes. Specifically, the Statute stipulates a catch-all clause which, in its essential parts, provides that the "FTC may render any other corrective measure which it deems necessary to cure the violation." Despite such clear language which affords the FTC with a legal basis to issue other types of corrective orders as it deems necessary, the FTC often resorts in taking a passive approach in rendering orders due to potential legal challenge. For example, even if a market-dominant entity were to illegally refuse to deal with a particular entity, the FTC has a tendency to merely issue a cease and desist order to stop the act of "refusing to deal", instead of affirmatively directing the violator to commence "dealing" with the entity which it has been refusing to transact. In this regard, unfortunately, it is more often the case than not that the FTC's efforts are carried out in a passive manner than an affirmative manner.

The last significant factor that limits the FTC's efforts arises from the fact that the injured parties in competition law violation cases that arise in Korea seldom rely on legal means to recover their losses. A part of the reason why such phenomenon exists is due to the general culture that prevails in Korea, wherein people in general are not accustomed to resolving disputes through legal means. Aside from that, another major reason seems to be based on the fact that expected benefits to be realized from taking legal action is often minimal compared to the amount of time and cost one has to outlay in carrying out such measures. Such in fact seems to be case since the amount of damages an injured party is able to recover under the Statute is limited to the actual amount of damages one suffers, while substantial amount of time and cost must be spent in relation to carrying out the initial investigation process, assessing damages, paying legal fees, etc. As a related matter, another factor that deters injured parties from resorting to legal measures is due to the fact there is no class-action suit available in Korea. Although a competition law violation case typically involves a sizable number of parties suffering damages, it is often the case that the amount of damages any one party suffers, on average, is not significant. Therefore, without the option of resorting to a class-action suit, it often becomes somewhat impractical for any single party to commence a legal suit on its own.

## III. Measures for Improvements

In light of the aforementioned factors that seem to limit the FTC's efforts in effectively regulating violators and preserving the interest of injured parties, there appears to be two main areas that require measures for improvements. The first area relates to amending the current Statute so that legal means to recover damages arising from a competition law violation become more attractive as well as accessible to injured parties. The second area relates to incorporating a system which would afford the FTC with a firm authority to enforce more creative and affirmative orders.





### *A. Measures to Improve Legal Remedies*

Currently, the number of civil suits that are being raised in relation to violations of the Statute on an annual basis is at a minimal level. As discussed previously, some of the reasons that are attributable to such low number are due to such factors as cultural indifference in resorting to legal remedies, low expectation on overall benefits, limitation on recoverable damages and inadequate system for a concerted action. In that regard, the first and foremost necessary measure for improvement that seems to be required in this area relates to taking steps to encourage the injured parties' reliance of legal remedies by making them more attractive and accessible.

One of the methods that may be considered for such purpose is to adopt a new compensatory system which would enable injured parties to recover treble damages, as it is available in the U.S. court system. In addition to the cultural indifference the general Korean population possesses with respect to the usage of legal means, another additional factor that negatively affects the usage of legal measures by the injured parties results from the lack of benefit that the legal measure provides. Despite the fact that the legal approach requires substantial amount of time and costs to be incurred, the ultimate benefit to be realized is limited to the actual amount of damages incurred by the injured parties, which often are not significant as noted above. Accordingly, in order to make the legal remedies more attractive, the limitation imposed with respect to the recoverable damages amount should be increased, if not abolished in all respect. Under the current Korean legal system, however, the amount of damages an injured party may recover, whether relating to personal injury or property damage which results from an intentional act or negligence, is limited to the actual amount of damages incurred by the party. Thus, adopting a new system which would allow an injured party to recover treble damages will require substantial revamping of Korean law in general and therefore, may need to be viewed as a long term project. For that matter, there has been a long debate within the legal community for many years on the issue of whether or not to introduce the punitive damages system in Korea, but that issue also has not been settled to date. In that regard, it seems to be the appropriate time for the legal community to exert more efforts in making a simultaneous in-depth review for the feasibility of introducing punitive damages as well as treble damages system into the Korean legal system.

Aside from the restructuring of the compensation scheme provided under the Statute, another approach that may be considered relates to lowering the barrier of raising a legal action against the offender. As discussed previously, under the current Statute, a party must prove the existence of four elements in order to bring a claim for damages. The four elements are an illegal act, intention or negligence in committing the act, causation, and damages. However, as a matter of fact, virtually all, if not all, competition law violations arise pursuant to the intentional acts of offending companies, as such acts generally are carried out in implementing their business strategies. Accordingly, it appears that the requirement for an injured party to prove an offender's intention or negligence merely is an unnecessary burden which may be eliminated without causing any adverse effect to the current legal system. If it were to cause any impact, it most likely will facilitate the usage of legal system by the injured parties to recover their losses.

Also, as an alternative measure to monetary damages, it seems appropriate to afford an injured party the remedy to seek an injunction order. As noted previously, based on the fact the majority of the legal commentators holds a negative perception on the matter, the Korean courts, thus far, have been reluctant in rendering injunctive orders in connection with competition law violation cases. In that regard, one of the issues that often arises in relation to this matter relates to an argument that the injunctive order system, if allowed, may become an instrument for abuse by parties who may bring fraudulent claims in bad-faith. However, depending on the circumstances, there often are cases in which the provision of monetary damages alone will not suffice to compensate the overall losses incurred by an injured party. Further, considering the amount of time and cost normally required in commencing and obtaining a final injunctive order, the likelihood of the system being abused is minimal. If the system were to be adopted, it is more likely that the potential benefit to be realized would far outweigh the risk to be assumed.

Lastly, as discussed previously, despite the fact that a typical competition law violation case involves a sizable number of parties suffering damages, the amount of damages incurred by each party in some cases are very small. Sometimes the amount of actual damages suffered by each party is so small that it is impracticable and meaningless for one to even contemplate bringing a legal claim on an individual basis. For example, if a group of manufacturers of consumer goods were to engage in a cartel, the number of parties suffering damages will be substantial as a whole.





However, the amount of damages that each consumer suffers and is able to recover through a legal claim will be limited to the price paid for the product concerned. In such case, not only will it be impracticable and meaningless for one individual to commence a legal claim, but such may also be the case even if the claim were to be brought as a class-action suit in light of the legal cost to be incurred therewith. Therefore, in order to afford protection to consumers in such case where there are a large number of parties suffering damages, but where such damages on an individual basis is small, the Korean legislators should adopt a system similar to the Parens Patriae action available in the U.S. legal system, where a governmental agency, such as the FTC, would bring a claim on behalf of such group of parties desiring to seek damages.

### *B. Measures to Promote Affirmative Orders*

Based on the way the Statute is currently drafted, the FTC's enforcement efforts are limited in taking more or less passive measures against the offenders. Further, coupled with the fact that the FTC's enforcement efforts are under close scrutiny of legal commentators as discussed previously, cease and desist orders, in fact, are the most often relied upon enforcement measure that the FTC currently renders against the offenders of the Statute. Such is the case despite the fact that the Statute clearly affords FTC with some leeway to exercise discretionary judgment to a certain extent to enforce other measures as it deems necessary through the incorporation of a catch-all clause in the Statute, as discussed above. It seems that a part of the reason why the FTC is reluctant in enforcing other measures as it deems necessary pursuant to the catch-all clause is due to a potential challenge that it may face from the offender in reliance of legal commentators' opinion that any and all corrective orders must be supported by a firm legal basis. Accordingly, the FTC often is deterred from exercising its discretion to enforce a different measure from those already prescribed in the Statute, even if such discretionary measure in fact is more practicable in a given situation.

For example, in cases where certain parties engage in such activities as a cartel, resale price maintenance, exclusive dealings, etc., the issuance of a cease and desist order against such offenders to forbid engaging in such activities may suffice. On the other hand, however, if a certain entity with a monopoly in a particular market

(which also possesses all facilities essential for the market concerned) were to improperly refuse in making such facilities available to others, the issuance of a cease and desist order forbidding such entity from engaging in the act of "refusing to deal" most likely will not be sufficient. Rather, under the second exemplary case, it seems more practical that the FTC should issue an affirmative order, which, for example, would require the monopolistic entity to make its facilities available to others.

In that regard, in order to minimize such factors which essentially limit the FTC's regulatory efforts, there appears to be a need to amend the current Statute in such a way that it would allow the FTC to impose affirmative orders. However, the introduction of a system which would afford the FTC with the authority to issue affirmative orders as noted above may raise numerous legal issues based on an argument that it affords the FTC with excessive autonomous authorities. Accordingly, a more practical and realistic approach is to adopt a system which is similar to the Consent Decrees system available in the U.S. legal system, in which the FTC will be granted with the authority to issue an affirmative order against relevant parties provided that such parties voluntarily consent to abide by such order.

## IV. Conclusion

As we can see from the above, there definitely are potential measures that can be taken in an effort to minimize some of the obstacles the FTC currently faces in enforcing the Competition Statue. By all means, however, it is not to say that implementing any of the proposed measures noted above can be done easily. Because most, if not all, of the measures require certain amendment or restructuring to be effected to the relevant laws and regulations to a certain degree, it will take a substantial amount of effort and time on the part of the FTC and legislators to devise and incorporate relevant systems that are adaptable to the Korean legal system. However, despite such time and effort required to incorporate the proposed measures, it seems evident that the long-term benefits to be obtained substantially outweigh the impact the FTC may realize from exerting its time and effort. In sum, the proposed measures, in general, will promote the use of private remedies (i.e., civil claims) to resolve disputes by the Korean public, rather through public





remedies (i.e., administrative remedy or criminal sanctions), and the FTC will be able to save a substantial amount of its resources and to allocate such resources saved to other areas for more efficient regulatory efforts.